

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

NITISH S. BANGALORE,

Plaintiff,

Case No. 20-cv-893-pp

v.

FROEDTERT HEALTH INC, *et al.*,

Defendants.

**ORDER DENYING WITHOUT PREJUDICE DEFENDANTS' MOTION TO
DISMISS (DKT. NO 22) AND ORDERING DEFENDANTS TO FILE A STATUS
REPORT**

On June 12, 2020, the plaintiff filed a class action alleging that the defendants had violated the duties of loyalty and prudence required of ERISA-governed defined plan fiduciaries by, among other things, failing to monitor fees and ensure that they were reasonable, failing to monitor investments to ensure that they were prudent, failing to monitor the committee in charge of the plan and engaging in prohibited transactions. Dkt. No. 1. The plaintiff filed an amended complaint on September 10, 2020; the amended complaint omitted the allegations of engaging in prohibited transactions. Dkt. No. 19.

In lieu of an answer, on October 26, 2020, the defendants filed a motion to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Dkt. No. 22. The defendants' motion relied heavily on the Seventh Circuit's

decision in Divane v. Northwestern University, 953 F.3d 980 (2020),¹ and the plaintiff's response focused on what the plaintiff characterized as the defendants' misreading of that decision. See Dkt. No. 23 (defendants' brief in support of motion, citing Divane on eleven out of thirty pages); Dkt. No. 25 (plaintiff's opposition brief, citing Divane on six out of thirty-one pages and arguing that the defendants had misread Divane). In opposition, the plaintiff relied heavily on the Supreme Court's 2015 decision in Tibble v. Edison Int'l, 575 U.S. 523 (2015). See Dkt. No. 25 at 4-5.

On February 4, 2021, this court held a hearing on the defendants' motion to dismiss. Dkt. No. 31. After hearing argument (both on subject-matter jurisdiction and the merits of the defendants' arguments), the court took the motion under advisement. The hearing involved significant argument about the applicability of Divane.

Just shy of five months later—on July 2, 2021—the Supreme Court granted *certiorari* to review the Seventh Circuit's decision in Divane. Hughes v. Northwestern University, ___ U.S. ___, 141 S. Ct. 2882 (Mem) (July 2, 2021). On January 24, 2022, the Supreme Court vacated the Seventh Circuit's decision and remanded the case for further proceedings. Hughes v. Northwestern University, ___ U.S. ___, Case No. 19-1401, 2022 WL 199351

¹ The defendants also cited two other Seventh Circuit decisions—Loomis v. Exelon Corp., 658 F.3d 667 (7th Cir. 2011) and Hecker v. Deere & Co., 556 F.3d 575 (7th Cir. 2009)—and argued that, with Divane, these cases demonstrated that the Seventh Circuit had “time-and-again rejected attempts by individual participants to second-guess plan fiduciaries’ administrative decisions and to impose their personal preferences on other participants.” Dkt. No. 23 at 8.

(Jan. 24, 2022). The Court cited its 2015 decision in Tibble, asserting that the “categorical rule” applied by the Seventh Circuit “is inconsistent with the content-specific inquiry that ERISA requires and fails to take into account respondents’ duty to monitor all plan investments and remove any imprudent ones.” Id. at *2 (citing Tibble, 575 U.S. at 530).

Given the defendants’ extensive reliance on Divane and other Seventh Circuit cases that applied similar categorical rules, the court will deny the defendants’ motion without prejudice. The court will require that by the deadline below, the defendants must file a notice with the court indicating whether they either (a) need additional time to evaluate the Hughes decision and its impact on their position in this litigation, (b) plan to answer or otherwise respond to the amended complaint or (c) propose some other option.

The court **DENIES WITHOUT PREJUDICE** the defendants’ motion to dismiss. Dkt. No. 22.

The court **ORDERS** that by the end of the day on **February 11, 2022**, the defendants must file a status report providing the information the court described above.

Dated in Milwaukee, Wisconsin this 26th day of January, 2022.

BY THE COURT:

A handwritten signature in black ink, appearing to be 'P. Pepper', written over a horizontal line.

HON. PAMELA PEPPER
Chief United States District Judge